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No. 92-765

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF CROSS-PETITIONER

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1. PAINEWEBBER, ITS COUNSEL, AND THE JURY FOREMAN ARE RESPONSIBLE FOR THE MISCONDUCT IN THIS CASE.

PaineWebber grossly overstates BankAtlantic's case. BankAtlantic does not challenge the honesty and integrity of the judges or of most of the lawyers, jurors, and witnesses in this case. *See* Brief in Opposition at 1. BankAtlantic makes no claim that either the district court or the Eleventh Circuit joined in a "criminal conspiracy." *Id.* at 21. PaineWebber's exaggeration of BankAtlantic's position is simply a crass attempt to make it appear extreme and, thus, lacking in credibility.

BankAtlantic has very carefully and very specifically identified PaineWebber and its trial counsel, with the

assistance of the jury foreman, as the persons directly involved in the intentional misconduct in this case. Others likely facilitated this relatively sophisticated misconduct, perhaps unknowingly, but BankAtlantic has very narrowly delineated the primary wrongdoers and their wrongs.

Moreover, the orchestrated misconduct by PaineWebber, its counsel, and the jury foreman in this case is not a "new claim" as asserted by PaineWebber in its brief. Brief in Opposition at 21. Even while this case was still before the district court, BankAtlantic had demonstrated the basic elements of this coordinated misconduct: the previously concealed link between PaineWebber's counsel and the jury foreman; use of the link to provide the jury foreman with prompt access to a highly prejudicial newspaper article containing accusations and extraneous information about BankAtlantic and its chairman (including the information specifically excluded from evidence during trial); *sub silentio* use in PaineWebber's closing arguments of the accusations and extraneous information contained in the newspaper article read by the jury foreman (and, at the very least, seen by other jurors) on the same day as closing arguments; the related scurrilous attack PaineWebber had maintained against BankAtlantic's chairman throughout the trial; and a post-verdict conversation between the jury foreman and trial counsel for PaineWebber leading immediately to the jury foreman telling a newspaper reporter that he thought BankAtlantic's entire case was frivolous. All of this was also fully explained to the Eleventh Circuit on appeal.[1]

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[1] PaineWebber claims that BankAtlantic should have included the information about juror misconduct in a Rule 59(b) motion and filed it prior to February 5, 1990, rather than raising the juror misconduct in a Rule 60(b) motion filed on February 13, 1990. Brief in Opposition at 9-10, 12 n.9, and 20 n.19. PaineWebber neglects to inform this Court, however, that the judgment adverse to BankAtlantic was entered on November 24, 1989, and that the

Very significantly, PaineWebber has never—not in any pleading, brief, paper, or otherwise—denied the existence of a link between its counsel and the jury foreman or the fact that the jury foreman obtained the newspaper article with the extraneous and prejudicial information from the intermediary just before closing arguments. Despite repeated opportunities (indeed, encouragement by BankAtlantic) throughout this case to deny any connection and influence, PaineWebber has very carefully avoided such a denial. Nor has PaineWebber ever denied that it utilized the themes of the article in its closing argument, that it did attack Alan Levan throughout the trial in a manner to which the article offers substantial support, and that its counsel did have a post-verdict conversation with the jury foreman. Instead, PaineWebber has repeatedly attempted, as in this Court, to mock BankAtlantic's arguments by exaggeration in an attempt to mask PaineWebber's own refusal to deny its improper influence over the jury foreman and its use of the newspaper article to shape the outcome of the jury verdict.

The heart of the problem in this case is that both the district court and the circuit court, following traditional reluctance to closely examine jury misconduct in any but the most blatant of cases, would not allow BankAtlantic use of discovery tools necessary to formally prove the existence and scope of the more sophisticated form of misconduct by PaineWebber, its counsel, and the jury foreman. As BankAtlantic noted in its cross-petition, lawyers have in recent years become much more subtle and skilled in their abilities to influence both the media

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second judgment entered on January 26, 1990, did not in any way affect the November 24, 1989, judgment. The second judgment was in favor of BankAtlantic on PaineWebber's counterclaim for indemnification and was entered on PaineWebber's motion to allow for appeal. Under Rule 59, therefore, BankAtlantic was required to file its motion for new trial long before it learned of the juror misconduct. *See Cornist v. Richland Parish School Board*, 479 F.2d 37 (5th Cir. 1973).

and juries. Cross-Petition at 20. Greater effort is, therefore, required to demonstrate that misconduct has in fact taken place. Federal courts, however, have thus far shown a reluctance to confront this reality and either conduct or allow probing inquiry in the more complex cases of misconduct such as in the present case.

2. NEITHER BANKATLANTIC NOR ITS COUNSEL "FOSTERED" THE NEWSPAPER ARTICLE READ BY THE JURY FOREMAN.

PaineWebber accuses counsel for BankAtlantic, Eugene Stearns, of "fostering" the prejudicial newspaper article read by the jury foreman and, likely, other jurors in this case. Brief in Opposition at i, 11, 18, 22. The accusation is both false and illogical.[2]

When PaineWebber made this accusation in the district court, Stearns filed an extensive affidavit explaining that he did not initiate the article and that, in fact, he spoke with the reporter solely in an attempt to have publication of the story delayed until after the jury returned its verdict. R39-736-Exhibit C. In the affidavit, which PaineWebber has never even attempted to rebut, Stearns explained:

> 2. During the last several days of the trial of this cause I received a message of a call from a reporter from the *Miami Review*, Peter Katel. The message

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[2] PaineWebber has exhibited throughout this case a curious tendency to wrongly accuse others of the improper conduct in which it is engaging, probably because that offensive tactic usually serves as an effective technique to deflect attention from its own wrongdoing. In this case, there is a reasonable possibility that counsel for PaineWebber employed his firm's public relations-media consultant to stimulate the *Miami Review*'s interest in an article on BankAtlantic's litigation to be distributed on the very day of closing arguments and jury deliberations in this case. As with the link between PaineWebber's counsel and the jury foreman, however, traditional judicial reluctance to become involved in such matters precluded formal discovery on the matter.

advised me that the *Miami Review* was writing a story on BankAtlantic, the PaineWebber trial and the pending Borkson litigation [an action brought by certain minority shareholders against BankAtlantic].

3. During the trial of the above matter we were extremely concerned about the impact of news stories on this case. At the very outset of the trial we requested an instruction to the jury to refrain from reading news stores about the case. BankAtlantic severely curtailed its normal media advertising during this period, delaying the present advertising program for a considerable period beyond its original schedule. As counsel for BankAtlantic Financial Corporation in the Borkson litigation, we attempted to extend the time to plead in response to the plaintiffs' complaint to avoid filing an answer and counterclaim which might create a news story during the PaineWebber trial. Because of the unexpected length of the PaineWebber trial and because Judge Aronovitz denied BankAtlantic Financial Corporation further extensions of time, we were compelled to file responsive pleadings during the last ten days of the PaineWebber trial. We substantially shortened the pleadings that had been originally prepared for filing in the Borkson litigation to eliminate as much newsworthy content as possible.

4. The message from the *Miami Review* reporter indicated that BankAtlantic's efforts at publicity avoidance were going to fail. I returned the call of the *Miami Review* reporter solely for the purpose of urging him to delay his story for several days until the verdict was rendered. I talked to him about the importance of the case to BankAtlantic in a futile attempt to cause him to weigh the benefit of his story to his newspaper versus the potential damage to everyone connected with this lengthy and expensive trial. I begged the reporter to discuss the matter with his editor and publisher and he agreed to do so. Unfortunately, however, I was subsequently advised that

> notwithstanding our plea, the story was going to appear before the jury returned its verdict.

Id. at 3.

As explained in detail in BankAtlantic's cross-petition, the article published by the *Miami Review* was extremely critical of BankAtlantic's chairman, Alan Levan, and of BankAtlantic's relations with Elliot Borkson, a minority shareholder. Cross-Petition at 11-13. The substance of the article echoed and supplemented PaineWebber's attack on Alan Levan at trial and the themes of its closing argument made on the same day that the foreman of the jury read the article. It makes no sense, therefore, to argue that BankAtlantic's counsel encouraged publication of such adverse and prejudicial information as claimed by PaineWebber. Moreover, it was counsel for BankAtlantic who first raised concern about, and who took steps to prevent, jury exposure to newspaper articles during the course of the trial.[3] *Id.*; R44-651-99-100.

3. BANKATLANTIC SUFFERED LOSSES EXCEEDING $30 MILLION THAT WERE CAUSED BY PAINEWEBBER'S BREACHES OF DUTY.

PaineWebber claims that a former chief financial officer of BankAtlantic, Herbert Stangl, who had been asked to resign from that position some time before the trial in

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[3] PaineWebber did not actually file "a motion to sanction BankAtlantic and its counsel for praticipating in such an article during trial" as asserted by PaineWebber at pages 11 and 22 of its brief in opposition. Rather, the motion was to poll the jury to determine if they had seen the article and to have the judge tell them (incorrectly) that counsel for BankAtlantic should not have even talked to the reporter. Although PaineWebber's motion can readily enough be seen as an attempt to call the jury's attention to the article and to emphasize its importance, the motion on its face did nothing more than echo BankAtlantic's previously expressed concern about the jurors reading articles to obtain extraneous information that should not have been considered in their deliberations.

this case, testified that BankAtlantic suffered no loss from the interest rate swaps.[4] Brief in Opposition at 6-7. In fact, however, Stangl's testimony was that no "accounting" loss had occurred because the actual economic losses had been expensed over the life of the swaps in accordance with applicable accounting standards. On cross examination, Stangl clearly stated this:

> Q. What we are talking about here is whether or not from an accounting standpoint you could have avoided having to book that huge loss legally?
>
> A. Yes.
>
> Q. And appropriately?
>
> A. Yes.
>
> . . . .
>
> Q. If, in fact, the swap made no sense on day one as an economic transaction, is the cost to BankAtlantic the total of the checks you wrote to California, sir; is that what it cost BankAtlantic?
>
> A. Yes.
>
> Q. So the critical issue is whether the swaps should have been put on in the first place; is that right?
>
> A. Yes.

R58-73-76.

In short, the "substantial evidence" of no loss to which PaineWebber refers is a gross distortion of testimony about complicated accounting principles and practices. PaineWebber's argument is much the same as the notori-

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[4] PaineWebber also refers to financial statements of BankAtlantic noting that the impact of the swaps was "insignificant." Brief in Opposition at 6-7. The reference, however, is to a financial statement of the bank's *holding* company which had previously shown the *entire* loss in *earlier* financial statements (because it was unable to "expense" the loss over a period of years like the bank itself). For the *holding* company, therefore, the effect of the interest rate swap losses at the time of the financial statements referenced by PaineWebber was insignificant *because the losses had already been booked in the past.*

ous attack by George Smathers against Claude Pepper's sister in the vicious Florida election campaign that cost Pepper his Senate seat: Smathers repeatedly told voters in highly accusatory tones that she was "a known thespian" and had "matriculated at college."

Upon closer examination, the rest of PaineWebber's so-called "substantial evidence" is equally deceptive and flimsy. For example, PaineWebber refers to pretrial deposition testimony by the chairman of Homestead that it had been in business for over 100 years and that "any suggestion that Homestead was not creditworthy was 'ridiculous.'" Brief in Opposition at 8-9. In fact, however, Homestead was seized by federal regulators some time ago because it was insolvent.

When the view is not obscured by PaineWebber's deceptions, by its scurrilous personal attack on Alan Levan,[5] and by its use of a prejudicial newspaper article to influence an already tainted jury, it can be seen that the evidence in this case conclusively proves that BankAtlantic suffered losses exceeding $30 million caused by PaineWebber's breaches of fiduciary duty, fraud, and other breaches of duty.

4. RULE 606(b), FEDERAL RULES OF EVIDENCE, WAS VIOLATED IN THIS CASE.

PaineWebber does not deny that, in contravention of the express provisions of Rule 606(b), Federal Rules of Evidence, the jurors in this case were questioned by the district court about the effect of the newspaper article on their minds and that denial of BankAtlantic's motion for new trial on the ground of juror misconduct was

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[5] PaineWebber states at page 20 of its brief in opposition that "there is nothing in the record which plausibly could be called 'attorney misconduct.'" Even the Eleventh Circuit noted, however, that "some of [PaineWebber's] arguments could be viewed as improper." A-21.

expressly based in part on the jurors' responses to the inquiries about their mental state. Brief in Opposition at 18-20. Instead, PaineWebber argues that the decisions of this Court in *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) and *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) permit such inquiries.

PaineWebber is in error. *Remmer* was decided in 1954, twenty one years before Rule 606(b) was enacted. *Smith* was a habeas corpus case from a state court decision based upon New York State law, and as the *Smith* Court stated: "A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution." 102 S.Ct. at 948. The Federal Rules of Evidence, including Rule 606(b), have no application in such cases.

Even more fundamentally, neither case considers or discusses the propriety of testimony by jurors about the effect of extraneous information on their mental or emotional state, especially when the jurors' own misconduct is at issue. Nor is any mention made of Rule 606(b) in any manner. If either case has any direct relevance to the present situation, however, it is *Remmer*, which states: "[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." 74 S.Ct. at 451.

The issue raised by BankAtlantic in this cross-petition is whether the federal courts will provide litigants who have made a strong *prima facie* case of a "communication, contact, or tampering directly or indirectly with a juror during trial," as in this case, with sufficient tools to be able to adequately prove the misconduct. Merely granting a hearing and asking the jurors a few questions at the hearing is not enough. In light of the increased

sophistication of parties and their counsel in dealing with the media and jurors, there must be an opportunity and an ability to conduct an adequate investigation prior to the hearing.

CONCLUSION

This Court should grant BankAtlantic's cross-petition.

Respectfully submitted,

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